

126

(3)

No. 08-1004

Supreme Court, U.S.
FILED

APR 10 2009

OFFICE OF THE CLERK

**In The
Supreme Court of the United States**

PATRICK L. BAUDE, et al.,
Petitioners,

v.

**P. THOMAS SNOW, Chairman of the Indiana Alcohol
& Tobacco Commission, and WINE & SPIRITS
WHOLESALEERS OF INDIANA,**
Respondents.

*On Petition for Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit*

**BRIEF IN OPPOSITION OF WINE &
SPIRITS WHOLESALEERS OF INDIANA**

FRED R. BIESECKER
Counsel of Record
PHILIP A. WHISTLER
BRIAN J. PAUL
ICE MILLER LLP
ONE AMERICAN SQUARE
SUITE 2900
INDIANAPOLIS, IN 46282-0200
(317) 236-2100

*Counsel for Respondent
Wine & Spirits Wholesalers
of Indiana*

April 10, 2009

QUESTIONS PRESENTED

1. Whether *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), supplies the proper standard for reviewing Indiana's facially neutral law requiring a consumer who wants to receive direct shipments of wine to visit the winery once, when the plaintiffs presented no evidence the law benefited Indiana wineries.
2. Whether there is a genuine circuit conflict on the same important matter where the Seventh Circuit upheld a statute requiring only a single in-person visit to a winery before wine can be shipped indefinitely, while the Sixth Circuit struck down a statute requiring an in-person visit to the winery before every shipment.

PARTIES TO THE PROCEEDINGS

Effective March 23, 2009, P. Thomas Snow became the Chairman of the Indiana Alcohol and Tobacco Commission, succeeding Respondent David L. Heath, who resigned. Pursuant to Rule 35.3, Snow is automatically substituted as a party.

Respondent Wine & Spirits Wholesalers of Indiana is an unincorporated trade association.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
I. Indiana's System for Regulating Alcoholic Beverages	1
II. The Seventh Circuit Proceedings	5
REASONS FOR DENYING THE WRIT	8
I. The Seventh Circuit's Decision Does Not Disregard or Significantly Depart from this Court's Prior Commerce Clause Rulings	8
II. There Is No Genuine Circuit Conflict Because the Indiana and Kentucky Statutes In Question Are Fundamentally Different	13
CONCLUSION	17
APPENDICES	
Appendix A: Transcript of Oral Argument before the Seventh Circuit, dated February 22, 2008	1b
Appendix B: Indiana Code § 7.1-5-11-1.5 ...	38b

TABLE OF AUTHORITIES

CASES

<i>Bridenbaugh v. Freeman-Wilson</i> , 227 F.3d 848 (7 th Cir. 2000), <i>cert. denied</i> , 532 U.S. 1002 (2001)	1, 4
<i>Brooks v. Walls</i> , 279 F.3d 518 (7 th Cir. 2002)	6
<i>Brown-Forman Distillers Corp. v. New York State Liquor Auth.</i> , 476 U.S. 573 (1986)	10
<i>California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.</i> , 445 U.S. 97 (1980)	4
<i>Cavel Int'l, Inc. v. Madigan</i> , 500 F.3d 551 (7 th Cir. 2007)	6, 10
<i>Cherry Hill Vineyard, LLC v. Baldacci</i> , 505 F.3d 28 (1 st Cir. 2007)	12, 16
<i>Cherry Hill Vineyards, LLC v. Lilly</i> , 553 F.3d 423 (6 th Cir. 2008)	13, 14, 15
<i>Crawford v. Marion County Election Bd.</i> , — U.S. —, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008)	13
<i>Dep't of Revenue of Kentucky v. Davis</i> , U.S. —, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008)	8, 10

<i>Exxon Corp. v. Governor of Maryland</i> , 437 U.S. 117 (1978)	10, 11, 12
<i>General Motors Corp. v. Tracy</i> , 519 U.S. 278 (1997)	10
<i>Granholm v. Heald</i> , 544 U.S. 460 (2005)	4
<i>Hunt v. Washington State Apple Adver. Comm'n</i> , 432 U.S. 333 (1977)	9, 11, 12
<i>Jelovsek v. Bredesen</i> , 545 F.3d 431 (6 th Cir. 2008)	16
<i>Minnesota v. Clover Leaf Creamery Co.</i> , 449 U.S. 456 (1981)	12
<i>Nat'l Paint & Coatings Ass'n v. City of Chicago</i> , 45 F.3d 1124 (7 th Cir. 1995)	5, 6, 10
<i>Nat'l Solid Wastes Mgmt. Ass'n v. Meyer</i> , 63 F.3d 652 (7 th Cir. 1995)	5, 10
<i>North Dakota v. United States</i> , 495 U.S. 423 (1990)	4
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970)	5, 6, 7, 12
<i>South Carolina State Highway Dep't v. Barnwell Bros., Inc.</i> , 303 U.S. 177 (1938)	11

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Amend. XXI, § 2	4
Ark. Code § 3-5-1602(c)	16
Del. Code tit. 4, § 512A(b)	16
Ga. Code § 3-6-32(a)(i)	16
Ind. Code § 7.1-3-26-6(4)	1
Ind. Code § 7.1-3-26-7	2
Ind. Code § 7.1-3-26-7(a)(6)	2
Ind. Code § 7.1-3-26-9(1)(A)	1
Ind. Code § 7.1-5-11-1.5(a)	1
Kan. Stat. § 41-348(e)	16
N. J. Stat. Ann. 33:1-10(2a)-(2b)	16
R. I. Gen. Laws § 3-4-8	16
S. D. Codified Laws § 35-12-5	16

RULES

Sup. Ct. R. 10(a)	14
-------------------------	----

STATEMENT OF THE CASE

This is a Commerce Clause challenge to Indiana's requirement that both in-state and out-of-state wineries conduct "an initial face-to-face transaction" with a consumer before shipping wine directly to that consumer. See Ind. Code § 7.1-3-26-9(1)(A). At that initial face-to-face transaction, the winery must verify "[p]roof of age by a state issued driver's license or state issued identification card showing the consumer to be at least twenty one (21) years of age" and obtain a "verified statement" that the consumer is at least 21 years of age, has an Indiana address, and intends the wine for personal use. See Ind. Code § 7.1-3-26-6(4). Once this initial face-to-face transaction has occurred, the consumer may order wine for direct shipment from that winery indefinitely, subject only to quantity limitations contained in the statute.

I. Indiana's System for Regulating Alcoholic Beverages

Indiana, like many states, regulates the importation, distribution, and sale of alcoholic beverages through a "three-tier" system in which producers (first tier) may sell only to licensed wholesalers (second tier), who then may sell only to licensed retailers or dealers (third tier), who in turn sell to consumers. See *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000), *cert. denied*, 532 U.S. 1002 (2001); Ind. Code § 7.1-5-11-1.5(a) (general prohibition on direct shipment of alcoholic beverages to Indiana consumers). In March 2006, Indiana created a new Direct Wine Seller's Permit which provides a limited exception to the general prohibition against direct-to-consumer shipping. Both

in-state and out-of-state wineries may obtain this Permit and must hold this Permit in order to ship wine directly to any Indiana consumer. See Ind. Code § 7.1-3-26-7.

Although petitioners challenged several other provisions of the March 2006 amendments to Indiana's wine distribution laws, the only provision still in dispute is the initial face-to-face transaction requirement.¹ The question presented is not, as petitioners would have it, "whether a state may accomplish indirectly that which it is constitutionally forbidden to do directly" (Petition at 4), because that question assumes the statute unlawfully discriminates against interstate commerce. Instead, the proper question is whether the Commerce Clause forbids Indiana from requiring both in-state and out-of-state wineries to conduct a single face-to-face transaction with a consumer before shipping wine to that consumer indefinitely.

¹ Petitioners filed their original complaint in May 2005. In February 2006, the district court granted the motion of Wine & Spirits Wholesalers of Indiana ("WSWI") to intervene as a defendant. (Dkt. 73). WSWI is an unincorporated trade association whose mission is to advance the interests and independence of Indiana's wine distributors and to uphold and protect the integrity of Indiana's three-tier distribution system. After the March 2006 amendments to Indiana's wine distribution laws took effect, petitioners filed an amended complaint. The district court found two of the challenged provisions unconstitutional and dismissed the rest of petitioners' claims. Pet. App. 49a-53a, 79a-84a, 93a-94a. Petitioners did not appeal the district court's adverse rulings. The court of appeals upheld the district court's judgment as to the "wholesale clause," Ind. Code § 7.1-3-26-7(a)(6), and that provision is no longer at issue.

It is undisputed that the initial in-person transaction requirement is evenhanded on its face and applies to all in-state wineries as well as out-of-state wineries. Indeed, the Indiana Winegrowers Guild complains that for more than 30 years before the 2006 legislation, many Indiana wineries shipped their wine to consumers without interference by State alcohol regulators, although the statute did not explicitly authorize such shipments. (Amicus Brief at 2 and n. 2). The Guild argues that the 2006 legislation “restricted Indiana wineries’ right to ship directly to consumers” and “led to the demise of at least one Indiana winery.” (Amicus Brief at 3, 4).

Petitioners contend that if the presumed effect of a facially neutral statute is more burdensome on out-of-state wineries than in-state wineries, that alone is sufficient to constitute “discriminatory effect,” which in turn subjects the statute to heightened scrutiny. Under petitioners’ theory, they need not prove any actual discriminatory effect, because the Court is required to presume discrimination from the allegation that it is costly for an Indiana oenophile to travel to the west coast in search of boutique, limited-production wines that are often not made available to Indiana distributors. Consistent with their theory, petitioners offered no evidence that as a result of the initial face-to-face transaction requirement, Indiana consumers were buying more Indiana wine and less out-of-state wine, or that Indiana consumers who could not get a specific preferred west coast wine were substituting an Indiana wine instead of another comparable west coast wine. As the Court of Appeals observed, “[n]one of the plaintiffs contends that Indiana’s law has led him to buy more wine from Indiana and less from other states. The law simply

shifts sales from smaller wineries (in all states, including Indiana) to larger wineries (all of which are located outside Indiana)." Pet. App. 12a.

Petitioners seek to equate "burden" or "disparate impact" with "discriminatory effect," but they are not the same. First, any statute that regulates the importation of alcoholic beverages by definition imposes a disparate burden on interstate commerce, but that is what Section 2 of the Twenty-first Amendment expressly authorizes:

Every use of § 2 could be called "discriminatory" in the sense that plaintiffs use the term, because every statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, then § 2 would be a dead letter.

Bridenbaugh, 227 F.3d at 853. Under petitioners' theory of "discriminatory effect," a pure three-tier system where all alcohol had to pass through in-state wholesalers and retailers would be unconstitutional, yet this Court has repeatedly described the traditional three-tier system as "unquestionably legitimate." *Granholm v. Heald*, 544 U.S. 460, 489 (2005); *North Dakota v. United States*, 495 U.S. 423, 432 (1990). This Court has also said the Twenty-first Amendment "grants the States virtually complete control over ... how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); accord *Granholm*, 544 U.S. at 488. Although *Granholm* teaches that the Twenty-first Amendment does not save a state law that facially discriminates against out-of-state wine, *Granholm* was a disparate

treatment case, not a disparate impact case, because both the Michigan and New York statutes discriminated on their face, a point petitioners now concede. (Petition at 8-9 and n.6).

II. The Seventh Circuit Proceedings

In their Statement of the Case, petitioners characterize the Seventh Circuit decision as ruling that "since the statute did not discriminate explicitly, it was not subject to heightened scrutiny" (Petition at 5). Petitioners also claim the Seventh Circuit "held that heightened scrutiny applies only when a state law discriminates on its face and not when it has a discriminatory effect" (Id. at 13).

The Seventh Circuit did nothing of the sort. Although the panel² did not find it necessary to "rehearse the standards" of this Court's Commerce Clause jurisprudence (including the standards relating to discriminatory effect), it most certainly did not create a new rule that all facially neutral laws must be reviewed under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Seventh Circuit has repeatedly recognized that facially neutral statutes can be subject to the same heightened scrutiny as facially discriminatory statutes, if they have a powerful disparate impact on interstate commerce. *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995) (opinion by Chief Judge Easterbrook); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 657 (7th Cir. 1995) (citing

² The panel was composed of Chief Judge Easterbrook, Judge Posner, and Judge Bauer.

National Paint; panel included Chief Judge Easterbrook and Judge Bauer). See also *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 555-56 (7th Cir. 2007) (discussing *National Paint*'s analysis of the *Pike* test when plaintiffs show at least "mild" discrimination against interstate commerce; opinion by Judge Posner; panel included Chief Judge Easterbrook).

The Seventh Circuit's opinion in this case cited both *National Paint* (twice) and *Cavel*. Pet. App. 3a, 9a. If the panel had intended to overrule *National Paint* and set up a new rule that all facially neutral statutes must be analyzed under *Pike*, presumably it would have said so, especially since Chief Judge Easterbrook authored both opinions. See *Brooks v. Walls*, 279 F.3d 518, 522 (7th Cir. 2002) ("One panel of this court cannot overrule another implicitly. Overruling requires recognition of the decision to be undone and circulation to the full court under Circuit Rule 40(e)."). Petitioners' argument that the Seventh Circuit has somehow *sub silentio* rejected this Court's Commerce Clause jurisprudence is a red herring.

The Seventh Circuit ruled against petitioners because they failed to submit any evidence of an actual discriminatory effect and thus failed to satisfy the well-settled requirement for invoking strict (or "heightened") scrutiny. This was made clear during oral argument, when Judge Posner repeatedly pressed petitioners' counsel for evidence that Indiana wineries had benefited from the initial face-to-face transaction requirement.³ In response to Judge Posner's

³ A full transcript of the February 22, 2008 oral argument before the Seventh Circuit is included as WSWI's Appendix A ("WSWI

questions, petitioners conceded there was no evidence about “the positive impact on these Indiana wineries of this rule.” (WSWI App. 22b). Judge Posner also said that because petitioners had “no evidence that the Indiana winery industry has benefited by this rule,” petitioners had failed to prove a “discriminatory effect” and therefore were not entitled to shift the burden of proof to the State. (WSWI App. 28b-29b).

The Seventh Circuit applied the *Pike* standard of review because petitioners failed to prove that Indiana wineries had benefited by the rule, not just because the statute was neutral on its face. As Judge Posner put it, “[y]ou don’t have a law that, in fact, favors a local industry, even though it doesn’t say it does because that’s what you have no evidence of.” (WSWI App. 28b). In other words, if petitioners had proven that Indiana’s facially neutral law in fact favored the Indiana wine industry, then Judge Posner was suggesting there would have been a “discriminatory effect” and the burden would have shifted to the State under the heightened scrutiny standard of review. Because there was no such evidence, the court properly applied the *Pike* standard of review.

App’). The Seventh Circuit does not prepare transcripts of oral arguments, but instead posts the digital audio files of the oral arguments on its website. This transcript was prepared by a court reporter based upon the audio file of the oral argument. The audio file is available on the Seventh Circuit’s website, www.ca7.uscourts.gov.

REASONS FOR DENYING THE WRIT

1. The Seventh Circuit's Decision Does Not Disregard or Significantly Depart from this Court's Prior Commerce Clause Rulings

Petitioners accuse the Seventh Circuit of “openly refus[ing] to follow” and “disregard[ing]” this Court’s Commerce Clause cases. (Petition at 14-15). The basis for this accusation is that the panel opinion does not expressly recite that facially neutral statutes can be subject to the same rigorous scrutiny as facially discriminatory statutes, if there is a sufficiently strong disparate impact on interstate commerce. As discussed above, the Seventh Circuit ruled against petitioners because of a failure of proof, not because of a new legal test. It is patently unreasonable to infer from this omission that the Seventh Circuit “openly refused to follow” this Court’s precedent. The Seventh Circuit cited this Court’s recent Commerce Clause decision in *Department of Revenue of Kentucky v. Davis*, ___ U.S. ___, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008), which likewise does not expressly recite the “discriminatory effect” language from previous cases. See 128 S. Ct. at 1808-09.

Petitioners complain that the Seventh Circuit did not cite, acknowledge, or refer to the Supreme Court cases petitioners relied on below. That is because all the cases petitioners cited involved statutes that were facially or purposefully discriminatory. (WSWI Reply Br. at 9-11).⁴ Notably, although petitioners now seek

⁴ Petitioners assert that during oral argument, one member of the panel stated explicitly that “I don’t care what the Supreme Court

to rely on *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), which did involve a facially neutral statute, petitioners did not cite or discuss *Hunt* in their Seventh Circuit brief or oral argument.

says." (Petition at 15, n.12). In fact, the panel member (Judge Posner) did not say that, and what he did say, in context, was simply that the Supreme Court cases alluded to by petitioners did not involve a statute such as the face-to-face requirement, which neither explicitly nor in fact favors a local industry:

JUDGE POSNER: Remember, you haven't shown any discrimination. You haven't shown any discrimination against interstate commerce.

MR. TANFORD: I disagree. I think we have shown —

JUDGE POSNER: No, you haven't, because you have no evidence that the Indiana winery industry has benefited by this rule. Zero evidence.

MR. TANFORD: But the Supreme Court cases have not required such evidence.

JUDGE POSNER: No, forget the Supreme Court cases. The Supreme Court cases — well, we don't have to forget them, but the point is you don't have, you don't have a law that is, explicitly favors a local industry.

MR. TANFORD: Correct.

JUDGE POSNER: You don't have a law that, in fact, favors a local industry, even though it doesn't say it does because that's what you have no evidence of.

So all you're left with is, yeah, there's a — any regulatory provision that's likely to burden interstate commerce, right, to require pure food or something and, you know, or, you know, worried about spoilage and that hurts foreign sellers, you know, refrigeration requirements, goodness knows what. So if you want to prove a burden on interstate commerce there, you have to show evidence that this regulatory goal of whatever it is, protecting minors, preventing, you know, food from spoiling, is spurious and you don't have any evidence of that

(WSWI App. 27b-28b).

The Seventh Circuit did not “disregard” this Court’s Commerce Clause cases; instead, it merely disagreed with petitioners’ effort to apply this Court’s language from facial discrimination cases to the totally different context of a facially neutral statute such as Indiana’s. The Seventh Circuit clearly recognized that facially neutral statutes that have the effect of benefiting in-state economic interests over out-of-state interests may be subject to heightened scrutiny. *See, e.g., Nat’l Solid Wastes*, 63 F.3d at 657, *quoting Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Cavel*, 500 F.3d at 551 (no discrimination where “[n]o local merchant or producer benefits from the ban ...”); *Nat’l Paint*, 45 F.3d at 1132 (“Unless the law discriminates against interstate commerce expressly or in practical effect, there is no reason to require special justification.”) (emphasis added).

This Court recently observed that “a fundamental element of dormant Commerce Clause jurisprudence” is the principle that “any notion of discrimination assumes a comparison of substantially similar entities.” *Davis*, 128 S. Ct. at 1811, *quoting General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). As a result, “[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.” *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978). In *Exxon*, this Court explained that “[i]f the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market ... the regulation may have a discriminatory effect on interstate commerce.” 437 U.S. at 126 n. 16 (citations omitted). In this case,

the Seventh Circuit did not “disregard” this Court’s precedent; to the contrary, it conscientiously applied this Court’s precedent and insisted that petitioners produce evidence that the law benefited Indiana wineries at the expense of non-Indiana wineries – evidence petitioners admittedly did not have.

The Seventh Circuit decision also applied the distinction, long recognized by this Court, between a burden on interstate commerce and discrimination against interstate commerce. *See, e.g., Exxon*, 437 U.S. at 127 (“interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.”); *Hunt*, 432 U.S. at 350 (“the challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them.”); *South Carolina State Highway Dep’t v. Barnwell Bros., Inc.*, 303 U.S. 177, 189 (1938) (“In each of these cases, regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits”).

Because petitioners conceded they have no evidence that the initial face-to-face transaction requirement benefits Indiana wineries at the expense of non-Indiana wineries (WSWI App. 22b), petitioners try to shift the focus to Indiana consumers, arguing that the cost of travel to the west coast deters them from buying wine from some subset of out-of-state wineries. First, as the Court of Appeals explained, “it is not necessarily substantially more expensive (per winery) to sign up at a larger number of west coast wineries than at an equivalent number of Indiana wine producers.” (Pet. App. 8a). But even assuming the

cost of travel is a serious deterrent to oenophiles, it does not follow that the effect of the initial face-to-face transaction requirement is "to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market." *Exxon*, 437 U.S. at 126 n. 16. If anything, the record in this case suggests that the most significant practical effect of the face-to-face requirement was to restrict Indiana wineries from continuing the practice of shipping wine directly to their customers. (Pet. App. 12a; Amicus Brief at 2-3). That is a far cry from *Hunt*, where the statute had the "obvious" consequence of "raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected." 432 U.S. at 350-51. Compare *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-73 (1981) (distinguishing *Hunt* and upholding statute that prohibited all milk retailers from selling their products in plastic, non-returnable milk containers; since the statute did not discriminate against interstate commerce, it was reviewed under *Pike*).

Petitioners' real complaint is that they are unable to get – by their preferred method of direct shipment – certain boutique collector wines without making an initial visit to the winery. As petitioners' counsel acknowledged in another case, the alleged "constricted availability of wine is due in large part to the three-tier system itself," *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 38 (1st Cir. 2007), not Indiana's initial face-to-face transaction requirement. Petitioners had their opportunity to prove actual discriminatory effect, but they failed to prove that the initial face to face transaction requirement benefited

Indiana wineries. Accordingly, the Court of Appeals repeatedly noted that there was little relevant evidence in the record. *See, e.g.*, Pet. App. 6a (“it takes more than lawyers’ talk to condemn a statute under *Pike*”); 9a (“How well any given system of screening works is an empirical subject on which we lack reliable information”); 11a (“Given the state of this record, and the state of the empirical literature, we know very little.”).⁵

In short, the Seventh Circuit’s decision is wholly consistent with this Court’s Commerce Clause precedent, and petitioners’ failure of proof is not a legitimate basis for granting the writ of certiorari.

***II. There Is No Genuine Circuit Conflict
Because the Indiana and Kentucky Statutes
In Question Are Fundamentally Different***

Petitioners assert that the Seventh Circuit’s decision in this case conflicts with the Sixth Circuit’s decision in *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008), which (according to petitioners) “struck down a similar face-to-face rule in Kentucky.” (Petition at 6). Characterizing the Indiana and Kentucky statutes as “similar” is a stretch at best. Petitioners conspicuously avoid discussing that the Kentucky statute requires an in-person visit to the winery before every direct shipment of wine, while the Indiana statute requires only a single in-person visit

⁵ The Court of Appeals also pointed out that Indiana believes “in person verification with photo ID helps to reduce cheating on legal rules, for both buying wine and voting (and perhaps other subjects)” Pet. App. 10a, citing *Crawford v. Marion County Election Board*, ___ U.S. ___, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008).

before wine can be shipped indefinitely. See *Lilly*, 553 F.3d at 433; Pet. App. 5a. This is a fundamental difference. For example, the Seventh Circuit noted that “[m]any oenophiles vacation in wine country, and on a tour through Napa Valley to sample the vintners’ wares a person could sign up for direct shipments from dozens of wineries.” Pet. App. 7a. Under Indiana law, once the initial face-to-face transaction requirement is met, the wineries can ship directly to consumers indefinitely.

That is not the case under Kentucky law. As the Sixth Circuit explained:

Under Kentucky’s in-person requirement, even if a winery has established a relationship with an individual consumer or a restaurant and has verified their age and shipping address, the customer must travel to the winery each time he or she wishes to execute a purchase.

Lilly, 553 F.3d at 433.⁶

Because of this fundamental difference between the Indiana and Kentucky statutes, there is no genuine conflict between the Sixth Circuit and the Seventh Circuit “on the same important matter.” Rule 10(a). It is true that the Sixth Circuit found petitioners’ cost of travel argument persuasive, while the Seventh Circuit did not. Compare *Lilly*, 553 F.3d at 433, with

⁶ The Sixth Circuit’s decision in *Lilly*, issued on December 24, 2008, does not discuss or even cite *Baude v. Heath*, which was decided on August 7, 2008 and was brought to the Sixth Circuit’s attention shortly thereafter, prior to the Sixth Circuit oral argument on September 18, 2008.

Pet. App. 7a-8a. However, this merely reflects the fundamental difference between traveling once, and traveling continuously; the cost of traveling to Napa Valley once and signing up at dozens of wineries is not reasonably comparable to the cost of traveling to the winery "each time he or she wishes to execute a purchase." *Lilly*, 553 F.3d at 433.

It is also true that the Sixth Circuit presumed "small Kentucky wineries [would] benefit from less competition from out-of-state wineries" as a result of Kentucky's in-person requirement (*id.* at 433), while the Seventh Circuit required petitioners to submit evidence of actual discriminatory effect, i.e., evidence that Indiana wineries actually benefited from the initial face-to-face transaction requirement at the expense of non-Indiana wineries. This difference can likewise reasonably be explained by the difference between merely having to visit the winery once and having to visit the winery before each and every shipment.

The alleged conflict, if it exists at all, is also of very recent origin. As petitioners point out, there are appeals pending in the Third and Ninth Circuits on challenges to the New Jersey and Arizona wine distribution laws. Although the New Jersey and Arizona statutes are significantly different from Indiana's statute, the forthcoming decisions from the Third Circuit and the Ninth Circuit may resolve or develop certain issues or perhaps clarify and narrow the issues. The other pending appeals do not provide a compelling reason to grant certiorari in this case at this time.

Finally, even if there were a genuine conflict between the Sixth Circuit and Seventh Circuit decisions, the issues presented by this case are not sufficiently important to justify granting the writ. Petitioners claim at least ten other states “have laws deterring direct sales by requiring consumers to appear in person at an out-of-state winery before they may buy wine.” (Petition at 10). Most of those state statutes, however, do not authorize direct shipping of wine to consumers. See *Baldacci*, 505 F.3d 28 (Maine); *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008) (Tennessee); Ark. Code § 3-5-1602(c); Del. Code tit. 4, § 512A(b); N. J. Stat. Ann. 33:1-10 (2a)-(2b); S. D. Codified Laws § 35-12-5. The laws of Georgia and Rhode Island are similar to Kentucky’s law, while in Kansas wine must be shipped to a licensed retailer. Ga. Code § 3-6-32(a)(i); R. I. Gen. Laws § 3-4-8; Kan. Stat. § 41-348(e).

The statutory requirement of a single “initial face-to-face transaction” as a condition of receiving direct shipments of wine indefinitely is unique to Indiana. Thus, granting certiorari in this case would not definitively resolve any legal issues of national significance applicable to wine producers, nor would it resolve the related litigation involving challenges to state laws regulating wine retailers and distributors.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Fred R. Biesecker

Counsel of Record

Philip A. Whistler

Brian J. Paul

ICE MILLER LLP

One American Square

Suite 2900

Indianapolis, IN 46282-0200

(317) 236-2100

Counsel for Respondent

Wine & Spirits Wholesalers of Indiana

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NOS. 07-3323 & 07-3338

[Dated February 22, 2008]

PATRICK L. BAUDE, et al.)
)
Plaintiffs-Appellees,)
)
-vs-)
)
DAVID L. HEATH, Chairman of)
the Indiana Alcohol and Tobacco)
Commission,)
)
Defendant-Appellant.)
)
-and-)
)
WINE AND SPIRITS)
WHOLESALEERS OF INDIANA)
)
Intervening)
Defendant-Appellant.)
)

Before:

**Chief Judge Easterbrook
Judge Posner
Judge Bauer**

**ORAL ARGUMENT
February 22, 2008**

(Transcript of Audio)

Connor + Associates, Inc.
1650 One American Square
Indianapolis, IN 46282
(317)236-6022

[p.2] **APPEARANCES**

**FOR THE PLAINTIFFS-APPELLEES,
*Patrick L. Baude, et al:***

James A. Tanford
INDIANA UNIVERSITY SCHOOL OF LAW
211 S. Indiana Avenue
Bloomington, IN 47405

**FOR THE DEFENDANT-APPELLANT,
*David L. Heath, Chairman of the Indiana
Alcohol and Tobacco Commission:***

Thomas M. Fisher
OFFICE OF THE ATTORNEY GENERAL
Indiana Government Center South
Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204

**FOR THE INTERVENING
DEFENDANT- APPELLANT,
*Wine and Spirits Wholesalers of Indiana:***

Fred R. Biesecker
ICE MILLER, LLP
2900 One American Square
Indianapolis, IN 46282

[p.3] **INDEX**

ORAL ARGUMENT	4
by Thomas M. Fisher	
ORAL ARGUMENT	17
by Fred R. Biesecker	
ORAL ARGUMENT	23
by James A. Tanford	

[p.4] (*Beginning of Digital Recording.*)

ORAL ARGUMENT,

BY THOMAS M. FISHER:

MR. FISHER: Thank you, Your Honor. May it please the Court. The logic of the Plaintiffs' attack on Indiana's one time, in-person transaction requirement as a precursor for the direct shipment of wine to Indiana customers amounts to an attack on Indiana's three-tier distribution system. It's a system that the Supreme Court in *Granholm* has said is unquestionably legitimate. The real crux of --

CHIEF JUDGE EASTERBROOK: I don't understand this at all. Indiana doesn't have a

three-tier system because it allows direct shipment by wineries.

MR. FISHER: Well, has a narrow --

CHIEF JUDGE EASTERBROOK: (Inaudible) path tier system. I don't see how any of this bears on the in-person verification requirement.

MR. FISHER: Well, the general rule, of course, is that there is no direct shipment. That's the starting point. You have to go through the wholesalers who then go to the [p.5] retailers who then go to the customers. But there's a limited exception where the customer goes to the winery --

CHIEF JUDGE EASTERBROOK: Indiana is perfectly free to require everything to go through three tiers, and it doesn't. The only argument in this case is that having made this exception for direct shipment, it's done it in a way that disfavors out-of-state sellers. That's what we need to focus on, not this three-tier business.

MR. FISHER: Your Honor, I don't disagree with that. The point I'm making is that when we consider what the Plaintiffs are saying, which is the geography of the -- of California and Oregon and Washington makes this law unconstitutional, the same would be said, the same would be said with respect to the three-tier system as a whole.

CHIEF JUDGE EASTERBROOK: You're not saying that the law is unconstitutional because California has mountains and deserts and Indiana doesn't (inaudible) --

MR. FISHER: No, geography in terms of its relationship, I'm talking about its relationship [p.6] to the Indiana customers; that it's easier to go to a winery in Indiana, which would be the same if Indiana

--

CHIEF JUDGE EASTERBROOK: It's actually probably easier to go to wineries in California.

MR. FISHER: I'm sorry?

CHIEF JUDGE EASTERBROOK: Most oenophiles spend much more time at California wineries than they do at Indiana wineries.

MR. FISHER: Which is exactly why this law is valid. If that's the case, then we cannot infer any sort of protectionist purpose or effect or rationale underlying this law. What we've got is a law that treats out-of-state wineries and in-state wineries equally every bit as much as a total ban on direct shipment would, with a limited exception for in-person sales where there's an opportunity to verify the identity of the purchaser. That is exactly the kind of thing that Granholm was contemplating would be valid. The idea is to -- yes?

CHIEF JUDGE EASTERBROOK: I think we need to get to the nub of this case. Obviously, the law does not engage in disparate treatment. And equally obviously, as the District Court said, [p.7] it has some disparate impact. Because other things equal, it's more costly to sign up with a California winery in California or a Michigan winery in Grand Traverse than with an Indiana winery. We need to figure out

whether that disparate impact is excessive in relation to the benefits.

We're not getting anywhere talking about three tiers and whether there's disparate treatment. Don't really need to go there.

MR. FISHER: Fair enough. There is no proof in the record, which is the Plaintiffs' burden, to show that there is that sort of Pike balancing problem, that it so outweighs, that the disparate impact so outweighs the advantages that Indiana gets in terms of its ability to have a way to protect against --

JUDGE POSNER: What does the record show about the Indiana wine industry?

MR. FISHER: In terms of --

JUDGE POSNER: Well, where these -- how large is it, where it's located. There are wineries, for example, in southern Michigan, they're very accessible to people in South Bend, for example. Where are the Indiana wineries?

[p.8] **MR. FISHER:** I don't -- I can't -- there aren't that many to begin with. I think there are a few in southern Indiana, I think maybe one in northern Indiana. There used to be one in Terre Haute but, as the amicus of the Indiana Wine Growers Guild pointed out, it closed as a result of this law. There was a direct impact, negative impact on an Indiana winery. So there is that equal --

JUDGE POSNER: But I'm just wondering, does the record contain information about, for example, a map showing where all the wineries are located?

MR. FISHER: Your Honor, I'm not familiar with that, if it does. And I --

JUDGE BAUER: This is maybe a potential customer, you ought to send them a copy of the map.

MR. FISHER: Right.

CHIEF JUDGE EASTERBROOK: You're talking to a judge who passes through Indiana regularly on his way to southern Michigan.

MR. FISHER: Well, I'm not here to promote the Indiana wine industry, nor is this law promoting the Indiana wine industry. It's [p.9] merely a screen to prevent access by minors to alcohol. It's the same kind of in-person check that we expect in ordinary wine and alcohol transactions, and that's true regardless of whether there's direct shipment or not.

It's -- and if Indiana can require a face-to-face transaction for all wine sales, which would be a ban on direct shipment, then it can require it for the first sale that would then lead to further --

JUDGE POSNER: Like the Crawford case, Indiana is big on in person identification to prevent fraud.

MR. FISHER: We're very serious about the value of face-to-face communication, Your Honor. We think it does have that important impact. There's an

opportunity to evaluate the credibility of the person purchasing the wine, is this -- yes.

CHIEF JUDGE EASTERBROOK: The Appellees' brief says that verification by Internet means, Choice Point or other age-verification systems previously used by the porn industry, is as effective as in-person verification. Their brief asserts that as an established fact.

[p.10] Is that something you think is an established fact?

MR. FISHER: Not at all. And I think that --

CHIEF JUDGE EASTERBROOK: What's the record show one way or the other?

MR. FISHER: I don't think it shows that -- it shows that there's a service. I don't think it shows that it's effective. In fact, I think --

CHIEF JUDGE EASTERBROOK: Their brief says, asserts just pointblank, it's established in this record that it's as effective, and then the brief says, "Facts, Paragraph 19; Facts, Paragraph 22." What is this all about?

I'm going to ask the same question of the Appellees, by the way.

MR. FISHER: Yeah. I think that what we've got is that there is a system in place that you can use.

CHIEF JUDGE EASTERBROOK: Do you know what that reference is?

MR. FISHER: No, I don't. I don't candidly.

CHIEF JUDGE EASTERBROOK: I tried to figure [p.11] out what it is but their brief doesn't tell us what the facts, paragraph something is referring to.

MR. FISHER: I think the bottom line from our perspective is that even if there are some facts that shows some level of efficacy for something like Choice Point, this is all about legislative judgment and are they in the realm of reasonableness when they choose the face-to-face transaction.

CHIEF JUDGE EASTERBROOK: Well, you may get someplace with saying this is Plaintiffs' lawsuit, it's their burden to show something about this. I'm just trying to figure out what we know.

Pike against Bruce Church says we have to make some judgment about relative costs and relative benefits. I'm just trying to figure out what we know on this record about relative costs and relative benefits.

MR. FISHER: Empirically --

CHIEF JUDGE EASTERBROOK: (Inaudible) know in the published literature, for that matter.

MR. FISHER: Empirically very little I think is the answer to that. And I think that [p.12] that's why Pike suggests that there's got to be this dramatic outweighing of the benefit, potential benefit to the state. And as long as the state is within, hasn't been disproven that there's some benefit of the face-to-face requirement over and against whatever burden on interstate commerce there may be.

CHIEF JUDGE EASTERBROOK: That's why I am asking this question. The Plaintiffs say it is established that there is no marginal benefit of this face-to-face identification requirement. And if that's established, then if there's a marginal cost, we know something. If it's not established, that -- do you see why I am asking?

MR. FISHER: I do, Your Honor. And there just is no evidence that that is established. I don't think that that statement can be taken at face value.

I think the other point to consider here is -- yes.

CHIEF JUDGE EASTERBROOK: I have another question which I'll ask you, and then I will be asking Mr. Tanford. What do you think is the consequence of the Supreme Court's decision on Wednesday in *Rowe* against New Hampshire Motor [p.13] Transport?

MR. FISHER: I think, Your Honor, that it accentuates the need for the in-person face-to-face transaction. Because what we've got built into the law elsewhere are requirements very similar to what *Rowe* invalidated with respect to --

CHIEF JUDGE EASTERBROOK: More or less, right. My real question is, is it now, after *Rowe*, is it lawful for anybody to ship wine in Indiana? Since it is now impossible to insist that the carrier verify age on delivery, that requirement of the state law is preempted.

MR. FISHER: Uh-huh.

CHIEF JUDGE EASTERBROOK: Doesn't it -- doesn't it mean that it is now illegal for anybody, in state or out of state, to ship wine in Indiana?

MR. FISHER: I guess I'm not following only because I think of the --

CHIEF JUDGE EASTERBROOK: Indiana's law says a winery can ship wine if and only if it assures that the carrier will verify age at the door.

MR. FISHER: Right.

[p.14] **CHIEF JUDGE EASTERBROOK:** The Supreme Court has held that that, such a law is preempted. No such verification can be insisted upon. And what the Supreme Court's opinion in Rowe says is what that means is New Hampshire should just ban all shipments of tobacco. Doesn't that mean Indiana has effectively banned all shipments of wine?

MR. FISHER: Well, I think that -- the way I read Rowe, and it's only been a couple days, so I guess I can go back and look at it again. But the way I understood it was to say that even the restriction requiring the local -- the retailer, the wine -- I'm sorry, to use in alcohol terms, the winery to require, to hire a transporter that's going to use those kinds of identification checks, even though it's a restriction on the seller, on the winery, that's still enough of an impact on the shipper to be --

CHIEF JUDGE EASTERBROOK: Exactly. So there are two possibilities. This is what I am trying to get at. Not clear you're tracking me but let me try again.

There are two possibilities. Either after [p.15] Rowe it is now perfectly fine for anybody to ship wine in Indiana without any verification on delivery, or because verification on delivery is now impossible, it is illegal for anyone to ship wine in Indiana. Which of these two possibilities does Indiana believe pertains?

MR. FISHER: I think it's the former. I think that what gets knocked out is the requirement that they use a shipper that's going to (inaudible), but I think it makes the ID check at the site of the sale for the first, for the first purchase all the more important because then you've got some means of verifying that the customer is over 21. If there's no means to, for Indiana to require that the shipper verify it on the other end, it's all the more important to have at least one time when it's verified on the front end at the site of the sale, the initial sale.

Granholm speaks also in terms of the significance of Webb-Kenyon. And the reason that Webb-Kenyon was not enough to sustain the Michigan and the New York laws was that the Wilson Act basically superimposed a requirement of neutrality, facial neutrality on alcohol [p.16] shipment laws. In this case that facial neutrality is easily met and that takes away the concern of the Wilson Act which reemphasizes the importance of Webb-Kenyon which, of course, tracks the language of the 21st Amendment itself.

But I think those are significant differences with what was at stake in Granholm, and also was a difference in many ways with what the Court typically confronts in other commerce clause analyses. So I would urge the Court to consider that sort of impact of

Webb-Kenyon to come to the conclusion that once there's a decision that there's no facial discrimination, that the law itself is valid.

I think I'll reserve the remainder of my time for rebuttal if there's nothing else.

CHIEF JUDGE EASTERBROOK: Thank you, Mr. Fisher.

Mr. Tanford?

Mr. Biesecker, were you going to argue now or were you -- I couldn't tell whether you were --

MR. BIESECKER: Well, yes, I was going to have three minutes; Tom Fisher was going to have [p.17] 12, I was only going to have three; he was going to save five for rebuttal.

CHIEF JUDGE EASTERBROOK: All right. Mr. Tanford, will you hold on a second? Let's hear from Mr. Biesecker now.

ORAL ARGUMENT,

BY FRED R. BIESECKER:

MR. BIESECKER: Thank you, Your Honor. First, in response to --

JUDGE POSNER: Who are you representing?

MR. BIESECKER: I represent the Wine and Spirits Wholesalers of Indiana.

In response to Judge Posner's question, there are interrogatory answers, the State's interrogatory answers in the record. There's not a map but it does have a list of Indiana wineries and where they are located. I believe there are 37 Indiana wineries, or were at the time, on the record here. And I believe only 15 of them, in fact, had a direct wine seller's permit as of October 2006, when the interrogatory answers were submitted.

The only additional point I wanted to make is that, as Judge Easterbrook said, most [p.18] facially neutral exceptions to the three-tier system are likely to have some degree of disparate impact on interstate commerce. But here, even without the added factor of the 21st Amendment, the Plaintiffs fail to meet their burden of proof in an ordinary commerce clause case, namely proving a sufficiently powerful disparate impact to justify heightened scrutiny as this Court said in *National Paint*. So that puts us at --

JUDGE POSNER: So are you defending this wholesaler rule, is that what you are defending?

MR. BIESECKER: I'm sorry?

JUDGE POSNER: Are you defending this wholesaler rule the State abandoned?

MR. BIESECKER: Both, yes. That's correct, Your Honor, both the -- yes, we are doing both.

JUDGE POSNER: But I understand it's supposed to have a state which said, you know, we don't care whether wineries wholesale or retail, you know, we just don't care. So would that then ban them from

direct sales in Indiana on the theory that they're allowed to wholesale and Indiana has this partial three-tier system, is that what your argument is, would be?

[p.19] **MR. BIESECKER:** Yes, Your Honor. Yes, the --

JUDGE POSNER: What sense does that make? I don't get that.

MR. BIESECKER: Well, Your Honor, I believe that the -- well, what the District Court referred to as the wholesaler restriction, I believe that has, there are two legitimate state interests in our view. One is simply to, to say that wholesalers may not preserve the three-tier principle in a sense, that wholesalers --

JUDGE POSNER: No, I understand. It's just something in Oregon. Oregon says, you know, we don't care what you do in Oregon, whether you sell direct or sell to retailers, sell to wholesalers, we don't care about that. We're just not interested. So then they want to have a direct sale permit for Indiana, how does that affect -- how does what Oregon does about the wholesaling inside Oregon affect the Indiana three-tier system?

MR. BIESECKER: Well, I think only in one sense, and that is this: What the legislature was attempting to do with this wholesaler restriction was, or what the direct wine [p.20] seller's exception and a wholesaler restriction was open it up only to wineries that in the legislature's judgment really needed it. If you already have a wholesaler, you can't get a direct wine seller permit.

JUDGE POSNER: No, no. But what if these wineries in Oregon, they don't -- they're tiny, they don't sell to wholesalers, but they could, right? I mean they could. There are just no rules in Oregon. So --

MR. BIESECKER: They could. I think what the Indiana legislature was trying to do was say if you already have a wholesaler or if you already self-distribute, then you don't need to --

JUDGE POSNER: No, no, but -- I don't understand. I don't get that.

Why do you even -- if you just have a state that isn't interested in maintaining the three-tier system, but the actual, the actual operations, the actual distribution system of small wineries in those states might be identical to small wineries in Indiana. So why would you want to put them under a special prohibition?

[p.21] **MR. BIESECKER:** Well, it also applies to Indiana wineries if they have self-distribution privileges outside.

JUDGE POSNER: No, no, I'm not talking about that. I'm talking about what the law provides in one of these other states. The State is indifferent and it lets you sell to anybody, right? It's not that they do have wholesalers, they don't have wholesalers. The State doesn't make this distinction.

Then you say, nevertheless, they're barred from selling, selling directly in Indiana and I don't get the sense of that.

MR. BIESECKER: Well, as I said, I think the legislature's standpoint was trying to say that if you have outlets for your products, whether you're in Indiana --

JUDGE POSNER: No, no, you're not listening to me. The fact that a state like Oregon, Washington, what have you, doesn't make any rules regarding whom you can sell to, doesn't mean that you, therefore, have a wholesaler, right? It just means, you know, you're not subject to this, to this kind of rule.

But if you're a tiny winery and you can't [p.22] afford, you know, the wholesaler's markup, then you're exactly in the same position as little Indiana wineries. So why should you be treated differently?

MR. BIESECKER: No, I understand, I understand your point, Your Honor. I think the legislature was simply trying to say that if you can self-distribute your own products, if you have an outlet for your products that way, even if you don't have a wholesaler --

JUDGE POSNER: No. But it may be completely infeasible for you to use it because you're too small.

MR. BIESECKER: Well --

JUDGE POSNER: So why didn't they make the law if you have a wholesaler, well, then, you have to use a wholesaler in Indiana? They didn't do that.

MR. BIESECKER: Yeah, they did say that if you have a wholesaler in --

JUDGE POSNER: No, they didn't say that.

MR. BIESECKER: Well, if you already have a wholesaler, you can't --

JUDGE POSNER: No, no, that's not what the law says.

[p.23] **MR. BIESECKER:** No, I understand that. I'm just trying to say there are two things. One is if you have a wholesaler, you can't get it; and if you self-distribute, you can't get it. And I understand that, you know, small winery, the point of the legislature was that small wineries that self-distribute their own products, whether they're Indiana wineries or out-of-state wineries, simply don't need or don't need the exception as much and that's why the legislature did it only for wineries that had no other outlets.

JUDGE BAUER: Your true defense is your three minutes are up. You're excused.

CHIEF JUDGE EASTERBROOK: We have your position. Thank you very much.

Now, Mr. Tanford.

ORAL ARGUMENT,

BY JAMES A. TANFORD:

MR. TANFORD: Thank you, Your Honor.

May it please the Court, the District Court found these two provisions in Indiana's wine law violated the commerce clause because, although they were

even-handed on their face, they had a [p.24] discriminatory effect --

JUDGE POSNER: Well, what do you mean by a discriminatory effect? Do you mean that the -- just looking at the identification provision, do you mean that they're discriminating in favor of the Indiana wine industry?

MR. TANFORD: The --

JUDGE POSNER: No, answer my question. Are they -- is that your complaint, they're discrim- -- they're trying to protect, they're trying to nurture this little, tiny industry, you know, an infant industry argument protectionist, is that what you are complaining about?

MR. TANFORD: That is their effect. We're not arguing that that was necessarily their legislative intent. We believe that the Supreme Court has said that --

JUDGE POSNER: So you think that's -- what is the evidence of that?

MR. TANFORD: The evidence is that there is a significant economic burden placed on --

JUDGE POSNER: Well, where is the evidence of that?

MR. TANFORD: The record --

[p.25] **JUDGE POSNER:** This industry in Indiana is so, according to Wikipedia, which I consider an

authority of some kind, according to Wikipedia there are only 270 acres in Indiana that are used for wine cultivation.

MR. TANFORD: Yes, but Indiana --

JUDGE POSNER: And we have an amicus brief from these little wine people in Indiana saying they don't like this law either, right? So where's the indication that this is discriminatory? It may still burden interstate commerce, it may be an unreasonable restriction on these distant wineries but that's different from arguing that it is actually -- that they are trying or the effect is to protect a local, a local seller against out-of-state sellers.

MR. TANFORD: We're arguing that it gives, that it places a commercial disadvantage in real economic terms.

JUDGE POSNER: No, no. Look, suppose you have a law that equally burdens out-of-state sellers and in-state sellers. Now, you can still complain that the effect on out-of-state sellers is not offset by any state, any legitimate state concern but that's a harder row [p.26] to hoe.

If you can show that there's an actual discriminatory impact against a local seller, it's easier to make out -- to make a case. And I don't see where the evidence is that this has any significant protectionist effect on these local wineries.

MR. TANFORD: Well, the record shows that our Plaintiffs and other customers are, can get to,

affordably, to the in-state wineries to make such a face-to-face appearance.

JUDGE POSNER: Well, where is that evidence?

MR. TANFORD: It is the -- it is in the statements of the consumer Plaintiffs. Each one of them in their affidavit stated that they have, in fact, gone to and made face-to-face appearances at the in-state wineries. Each one of them have talked about looking into the expense of having to go to a distant winery and have to stay overnight --

JUDGE POSNER: Okay. So are you saying that because of the expense, they're buying the wine at these local wineries?

MR. TANFORD: No.

[p.27] **JUDGE POSNER:** No? Of course not, right. So how do the local wineries -- so, look, these oenophiles, they go to these, this local winery and they say, Yuck, I'm not going to drink this stuff. I want to drink stuff from some boutique winery in California, but I can't afford to go there.

Now, that's a burden on interstate commerce. But it doesn't help the local wineries because they don't gain any sales from this. So my question is: Where is there evidence that the local wineries, despite their *amicus curiae* brief, benefit from this rule that you're challenging?

MR. TANFORD: I think there are two pieces of evidence. One is not all wine is oenophile wine. Not all consumers drink fancy wine --

JUDGE POSNER: No, no, I'm asking for evidence. I'm not asking for your speculations. Is there evidence about the impact, the positive impact on these Indiana wineries of this rule.

MR. TANFORD: There is -- no. There is --

JUDGE POSNER: Okay, fine.

MR. TANFORD: There is, however, evidence of the disadvantages.

[p.28] **JUDGE POSNER:** So let's move to the next question. So you have some impact on these distant wineries. You say negative, okay, that's the interstate commerce impact. But it's perfectly legitimate for a state not to want kids to buy this stuff. And we know, you know, from the Crawford case, we know Indiana is very concerned about fraud. And why is this a rational -- it may not be, you know, greatest or necessary, but why isn't it a, you know, a legitimate or plausible method of reducing purchases of wine by kids?

MR. TANFORD: Well, the record shows that it's ineffective in the first place. The record also --

JUDGE POSNER: Well, compared to what? Everything is -- all law enforcement is ineffective in the sense of imperfect. So compared to what is it no good?

MR. TANFORD: Compared to a variety of things. Both --

JUDGE POSNER: Well, don't give me a variety of things, be specific.

MR. TANFORD: It is let -- it is ineffective compared to online age verification.

[p.29] **JUDGE POSNER:** Well, how can that be? Because the online Internet verification, unless I don't know what I'm talking about is just an honor system.

MR. TANFORD: No, there are three, at least three online age verification systems called Choice Point, Veritas and Ideology. They have been approved for use, for example, by the Michigan Liquor Control Commission. They --

JUDGE POSNER: What, do they have your records of your birth certificate?

MR. TANFORD: They scan the Internet, they do various things to --

JUDGE POSNER: Well, for what? I don't have -- my birth certificate isn't on the Internet.

MR. TANFORD: You're not a minor, Your Honor. I would suggest --

JUDGE POSNER: Well, wait a second. That's the question. I might be a minor, right? When I order this wine, they have to go --

JUDGE BAUER: A long time delivery.

CHIEF JUDGE EASTERBROOK: Yeah, remember the famous New Yorker cartoon on the Internet, no one knows you're a dog, all right?

[p.30] **MR. TANFORD:** I do remember that.

CHIEF JUDGE EASTERBROOK: Judge Posner is asking the same question that I've asked Mr. Fisher, which is: Your brief says very confidently that we know as a fact that Choice Point, for example, is as effective as in-person verification. Your brief then cites, and this is the whole citation, "Facts: Paragraph 19."

MR. TANFORD: I apologize.

CHIEF JUDGE EASTERBROOK: What does that mean?

MR. TANFORD: That is the statement of facts in the beginning of the brief, Paragraph 19. And I apologize for the confusion.

JUDGE POSNER: Well, that's not exactly the record.

CHIEF JUDGE EASTERBROOK: Your brief is not a fact.

MR. TANFORD: No, but the --

CHIEF JUDGE EASTERBROOK: As far as the record is concerned.

MR. TANFORD: In that Paragraph 19 in the brief, it refers to items in the record. This is an issue that has been studied by public health officials. These studies have been [p.31] summarized in two public documents, the Federal Trade Commission Report in 2003 and a study by the National Academy of Sciences, both of which in the record and both of which are referred to. Both of those studies report that controlled

scientific studies of the effectiveness of face-to-face identification --

CHIEF JUDGE EASTERBROOK: Hold on. I've now gone to your brief, Paragraph 19. The only thing that is cited in Paragraph 19 is www.choicepoint.com/business/financial. In other words, you're citing to Check Point's (sic) own self-touting. You're not citing to an academic study.

MR. TANFORD: No, Your Honor, further down in the paragraph it refers to Docket No. 89, No. 6, "Reducing Underage Drinking," that is the National Academy of Sciences study.

CHIEF JUDGE EASTERBROOK: Docket No. 89/6, what docket in what?

MR. TANFORD: In the district, the District Court, District Court Docket No. 89, docket entry No. 89, broke the submissions in support of summary judgment down into what it called -- this one was No. 6, and it was a study called [p.32] "Reducing Underage Drinking."

JUDGE POSNER: Yeah, but your citation is very misleading because you're only citing that Docket No. 89/6 for the proposition that half of all minors have used fake identification to purchase alcohol. And then the next proposition, "Online age verification is probably more effective," that doesn't have any citation.

CHIEF JUDGE EASTERBROOK: Well, it doesn't follow from the proposition in the first half of

the sentence, that's for sure. That's about as big a non sequitur as I have seen in some time.

So if I go and look at Docket No. 89/6, is there going to be a scientific, you know, a statistically valid demonstration that Choice Point is as effective as ID over the counter?

MR. TANFORD: Let's call it as ineffective. Yes, there is.

JUDGE POSNER: How on Earth could such a study be conducted?

MR. TANFORD: I do not know, Your Honor. That exceeds --

JUDGE POSNER: Well, it doesn't sound -- it doesn't sound possible, right? It doesn't sound [p.33] possible.

MR. TANFORD: Well, these are the results --

CHIEF JUDGE EASTERBROOK: I could easily imagine a controlled study. I could imagine sending minors to Check Point to try to get approval and sending minors in with fake ID or something like that to try to --

JUDGE BAUER: Used to do that when I was a state prosecutor. It was very effective.

JUDGE POSNER: That hasn't been done, has it?

CHIEF JUDGE EASTERBROOK: Has that been done?

MR. TANFORD: I didn't -- there are numerous studies. They're summarized in these two --

JUDGE POSNER: No, no, that's not the question. That's not the question.

CHIEF JUDGE EASTERBROOK: I asked a concrete question. Has a particular kind of study been done? The answer -- there are three possible answers: Yes, no, and I don't know.

MR. TANFORD: Then the answer is I don't know.

[p.34] **CHIEF JUDGE EASTERBROOK:** Okay.

JUDGE POSNER: That's the most important issue in your case. That's the biggest issue in your case. You can't possibly win without showing that somehow online verification is, you know, patently inferior to the alternative.

MR. TANFORD: The Supreme Court decided Granholm without any showing of that, because the burden shifts to the State. We have come forward with the evidence --

JUDGE POSNER: No, it doesn't. Why does the burden shift? I don't get that. Why should the burden shift?

MR. TANFORD: If we're doing strict --

JUDGE POSNER: Remember, you haven't shown any discrimination. You haven't shown any discrimination against interstate commerce.

MR. TANFORD: I disagree. I think we have shown --

JUDGE POSNER: No, you haven't, because you have no evidence that the Indiana winery industry has benefited by this rule. Zero evidence.

MR. TANFORD: But the Supreme Court cases have not required such evidence.

[p.35] **JUDGE POSNER:** No, forget the Supreme Court cases. The Supreme Court cases -- well, we don't have to forget them, but the point is you don't have, you don't have a law that is, explicitly favors a local industry.

MR. TANFORD: Correct.

JUDGE POSNER: You don't have a law that, in fact, favors a local industry, even though it doesn't say it does because that's what you have no evidence of.

So all you're left with is, yeah, there's a -- any regulatory provision that's likely to burden interstate commerce, right, to require pure food or something and, you know, or, you know, worried about spoilage and that hurts foreign sellers, you know, refrigeration requirements, goodness knows what. So if you want to prove a burden on interstate commerce there, you have to show evidence that this regulatory goal of whatever it is, protecting minors, preventing, you know, food from spoiling, is spurious and you don't have any evidence of that.

MR. TANFORD: Well, even assuming we're under Pike, that's not what Pike says.

[p.36] **JUDGE POSNER:** What do you mean even assuming, where else should we be?

MR. TANFORD: I still think we should be under discriminatory effect because it --

JUDGE POSNER: Well, but there is no -- you haven't shown a discriminatory effect. The wine people in Indiana have filed an amicus brief challenging the same law. There's no indication that there's a discriminatory effect.

MR. TANFORD: The information --

CHIEF JUDGE EASTERBROOK: There is another way to put this, too. If you walk into a liquor store in Indiana, you will find it teeming with wine from California and Australia and France, and not from Indiana. There's just no reason to think that Indiana is shutting out the imports of wine in order to favor this trivial local --

MR. TANFORD: We make no claim that the three-tier system, that that market, the retail market

JUDGE POSNER: Or Indiana.

CHIEF JUDGE EASTERBROOK: Or Indiana as a whole. Everybody who drinks wine in Indiana is drinking wine from outside Indiana. This is not a border-closing statute by any remote stretch [p.37] of the imagination.

MR. TANFORD: Nor is a border-closing statute required. It is enough that the flow of commerce be restricted --

JUDGE POSNER: No, that's not enough, because it doesn't say -- many regulatory laws have a different impact on distant sellers and local sellers, right? And all they have to do is, you know, justify loosely without, you know, compelling proof that it's a, you know, reasonable rule. So asking for photo ID so you know who you're dealing with is a natural way to go. And the Internet verification on its face sounds, sounds like an honor system because people don't -- how much scanning do they actually do of the Internet?

MR. TANFORD: I do not know the internal workings, I do know --

JUDGE POSNER: Right. So why do you think it's effective?

MR. TANFORD: Because the Michigan Liquor Control Commission approved it. This is now the way that they have to --

CHIEF JUDGE EASTERBROOK: Perhaps they're pushovers.

[p.38] **MR. TANFORD:** Thirty-two states allow direct shipping without a face-to-face attempt. They must know something.

JUDGE POSNER: Yeah, and what about the others?

CHIEF JUDGE EASTERBROOK: Let's get back to Judge Posner's earlier analogy. Indiana has a photo ID requirement for voters, and I will bet Michigan does not. But you wouldn't be saying because Michigan doesn't have a photo ID requirement, Indiana's must be unconstitutional.

MR. TANFORD: Correct. There would be no discrimination between similarly-situated people.

CHIEF JUDGE EASTERBROOK: Well, then if Michigan accepts Choice Point, Indiana must isn't --

MR. TANFORD: No, I'm not saying that it must. But even Pike says, the third part of the Pike test is the question, "Could the local interests be served with a lesser impact on interstate commerce?" That's the quote out of Pike.

CHIEF JUDGE EASTERBROOK: Well, and that's why you find us asking what does the record show [p.39] about the relative efficacy of Internet verification and in-person verification?

MR. TANFORD: The record shows --

CHIEF JUDGE EASTERBROOK: If the record doesn't show something, you lose.

MR. TANFORD: You've misinterpreted me or I have misspoken. The record shows that attempts to purchase via online sources, minors are able to purchase approximately 30 percent of the time. But the studies on the face-to-face appearances is that they are able to purchase 45 to 90 percent of the time. Those are the studies summarized by the Federal

Trade Commission and by the National Academy of Sciences.

CHIEF JUDGE EASTERBROOK: What does the Federal Trade Commission --

MR. TANFORD: Oh, they do. They go into --

JUDGE POSNER: But you don't cite them.

MR. TANFORD: I don't. That is a level of detail that I did not go into. But they are in the record, they are not in the brief.

CHIEF JUDGE EASTERBROOK: So we just have to do our own work? One wonders what the point of having submissions from the parties is.

[p.40] **MR. TANFORD:** The record --

CHIEF JUDGE EASTERBROOK: Let me take you in a different direction. I asked Mr. Fisher, and warned that I would be asking you, what the effect of Rowe is in this case. Rowe looks like it knocks out the requirement of age verification on delivery, and it seems to me that can take us in two directions. One is it knocks out the entire direct shipping program, which is conditioned on age verification on delivery.

The other, which Mr. Fisher suggested, is that it knocks out age verification on delivery and leaves age verification at or before ordering even more important. What's your view of the effect of Rowe?

MR. TANFORD: I don't think it does either of those. I think what it does is it leaves it to the market.

That is at Rowe, one of the problems was that state law mandated the carriers to check IDs when the carriers didn't want to because it was economically ineffective.

CHIEF JUDGE EASTERBROOK: No, actually it didn't. What the Maine law did, and this is one reason why Rowe is, to me, a little mysterious. [p.41] Rowe mandated the carriers to check the contents of the packages. But what Rowe did about identification at the point of delivery was that it mandated the shipper to contract with a carrier willing to verify ID at the point of delivery.

MR. TANFORD: That's right. And the --

CHIEF JUDGE EASTERBROOK: That's what the Indiana law does, too.

MR. TANFORD: But Rowe said that that had the indirect effect of having a coercive effect on the carriers that didn't want to do this.

CHIEF JUDGE EASTERBROOK: That's exactly, Indiana's law and Maine's -- Indiana's liquor law and Maine's tobacco law are identical in this respect. There are only two options, Mr. Tanford. Which of them is right?

MR. TANFORD: Leave it to the market because the carriers already have -- it's in the record, the carriers have already developed voluntary programs to ship wine because there's lots of money to be made. This is a lucrative business. Thirty-two states allow direct shipping. And so that no coercion by the State

is necessary. You can have no such rule and [p.42] leave it to the market.

CHIEF JUDGE EASTERBROOK: The market isn't going to provide for something that's expensive if it is not legally required. Now --

MR. TANFORD: The wineries --

CHIEF JUDGE EASTERBROOK: Mr. Tanford.

MR. TANFORD: Yes?

CHIEF JUDGE EASTERBROOK: You seem to be in a state of denial. I wish you'd answer my question.

MR. TANFORD: I apologize, Judge. Perhaps if you'd ask me again, I would understand it.

CHIEF JUDGE EASTERBROOK: I think you understand it perfectly.

JUDGE BAUER: I don't. What's the question again?

MR. TANFORD: The question is, is Rowe applicable to the, directly transferable to state regulation of the alcohol industry?

CHIEF JUDGE EASTERBROOK: No, no.

MR. TANFORD: There's the 21st Amendment, maybe that gives the states some additional power because it was a preemption case.

CHIEF JUDGE EASTERBROOK: Are you taking back all the arguments in your brief? There are [p.43] two possible outcomes of Rowe. One is that there's no legal requirement of verification on delivery and, therefore, it is more important to verify identification and age earlier. And the other is that no direct shipments will henceforth be allowed in Indiana because an absolute legal requirement of Indiana that there be identification on delivery has now been invalidated.

Those are the two options, it seems to me.

MR. TANFORD: There are more ways of checking ID than just identification and just on delivery or just on sale. You can still use Choice Point.

CHIEF JUDGE EASTERBROOK: You are just refusing to engage.

MR. TANFORD: That's because I think that the question has trapped me into a no-lose proposition when those are not the only two options.

Given that two of them --

CHIEF JUDGE EASTERBROOK: Those are the only two options for the legal system.

MR. TANFORD: All right.

CHIEF JUDGE EASTERBROOK: The market, [p.44] shippers may find something in their own interest whether something is required by law or not. And it will also be that some shippers will find it not in

their interest to verify age. And we are interested, of course, in the latter set of shippers.

MR. TANFORD: Then the State will have to close the market. Thank you, Your Honor.

CHIEF JUDGE EASTERBROOK: Thank you very much, Mr. Tanford.

Anything further, Mr. Fisher?

MR. FISHER: Your Honor, if there are no further questions, I don't have anything additional.

CHIEF JUDGE EASTERBROOK: Thank you very much. The case is taken under advisement.

(End of oral argument recording.)

[p.45]

[illegible]

I, James P. Connor, RPR, CRR, CSR #93-R-1023 and a Notary Public and Stenographic Reporter within and for the County of Marion, State of Indiana at large, do hereby certify that I took down in stenograph notes the foregoing proceedings from a digital recording;

That the transcript is a full, true and correct transcript made to the best of my ability from my stenograph notes and the digital recording of said proceedings.

37b

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 4th day of March, 2009.

/s/ James P. Connor

NOTARY PUBLIC

My Commission Expires:

September 18, 2009

County of Residence:

Marion County

APPENDIX B

Indiana Code**IC 7.1-5-11-1.5****Shipments of alcoholic beverages to residents not having valid wholesaler permits**

Sec. 1.5. (a) Except as provided in IC 7.1-3-26, it is unlawful for a person in the business of selling alcoholic beverages in Indiana or outside Indiana to ship or cause to be shipped an alcoholic beverage directly to a person in Indiana who does not hold a valid wholesaler permit under this title. This includes the ordering and selling of alcoholic beverages over a computer network (as defined by IC 35-43-2-3(a)).

(b) Upon a determination by the commission that a person has violated subsection (a), a wholesaler may not accept a shipment of alcoholic beverages from the person for a period of up to one (1) year as determined by the commission.

(c) The commission shall adopt rules under IC 4-22-2 to implement this section.

As added by P.L. 121-1998, SEC. 2. Amended by P.L. 165-2006, SEC. 38.